Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

LOUIS R. NAPOLI,

Petitioner,

v.

FIRST UNUM LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* contains no statutory language or congressional history indicating whether beneficiaries thereunder are entitled to trials by jury in actions seeking legal, rather than equitable, relief. The Second Circuit affirmed the District Court's determination that Petitioner Lou Napoli was not entitled to a jury trial to determine whether Defendant-Respondent First UNUM Life Insurance Company must pay Mr. Napoli his past due long term disability benefits upon a *de novo* review by the federal courts. The Second Circuit's ruling is consistent with the ruling of nine other circuits who deny beneficiaries under ERISA the right to a trial by jury when evaluating their entitlement to past due benefits, reasoning that claims for past due benefits against fiduciaries under ERISA are inherently equitable, rather than legal, in nature. In *Great-West Life and Annuity Insurance Company v. Knudson*, 534 U.S. 204 (2002), this Court ruled that claims for past due monies under ERISA are legal, not equitable, in nature.

The question presented is whether an ERISA beneficiary who brings an action in federal court seeking past due benefits under § 502(a)(1)(B) of ERISA is entitled to a trial by jury?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at Napoli v. First UNUM Life Insurance Company, 78 Fed. Appx. 787 (2d Cir. 2003). The Second Circuit vacated and remanded for further proceedings the Opinion and Order of the United States District Court for the Southern District of New York, reported at 2003 WL 118504 (S.D.N.Y. 2003). *See* Appendices A and B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Second Circuit's Summary Order and Opinion was rendered on October 29, 2003.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment VII [Right to Trial By Jury]

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

29 U.S.C. § 1132(a)(1)(B)
[ERISA § 502(a)(1)(B)]

§ 1132. Civil Enforcement

(a) Persons empowered to bring a civil action.

A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under terms of the plan;

STATEMENT OF THE CASE

This case involves Petitioner's challenge to a determination by Respondent First UNUM Life Insurance Company ("First Unum") terminating Petitioner Lou Napoli's long term disability benefits under a group contract of long term disability insurance governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA").

Mr. Napoli suffers from triple coronary artery disease, which led to a severe heart attack he suffered on November 29, 1996, while working in his occupation as a government securities bond broker at his then employer, Garban LLC.

Mr. Napoli filed a claim for long term disability benefits under a group disability income policy issued by First Unum to Garban LLC under which Mr. Napoli was a plan beneficiary. The policy pays benefits to Mr. Napoli in the sum of $9,263.33 per month in the event that he is unable to perform each of the material duties of his regular occupation.

First Unum initially accepted the claim, agreed that Mr. Napoli was totally disabled and paid monthly benefits to him for seven months. Thereafter, First Unum determined that Mr. Napoli was not disabled within the meaning of the contract and terminated his monthly benefits on September 4, 1997. Mr. Napoli timely appealed First Unum's adverse benefit determination to First Unum as required by the group contract, and First Unum upheld its determination to deny Mr. Napoli the disability income benefits he was seeking.

Mr. Napoli commenced this action against First Unum in the United States District Court for the Southern District of New York on February 23, 1999. Federal jurisdiction over Mr. Napoli's initial Complaint was premised upon diversity, 29 U.S.C. § 1332. On October 31, 2000, Mr. Napoli filed a First Amended Complaint, however, seeking relief against First Unum exclusively under ERISA, thus asserting federal jurisdiction under 29 U.S.C. § 1331. Both Mr. Napoli's initial Complaint and his First Amended Complaint demanded a trial by jury.

Prior to the taking of any discovery, First Unum moved for "judgment on the administrative record," essentially seeking an order confirming its administrative determination that Mr. Napoli was not entitled to past or future long term disability benefits. Mr. Napoli opposed the motion, arguing that the motion was, in essence, a motion for summary judgment. Mr. Napoli cross-moved for discovery and a trial by jury.

By judgment dated January 16, 2003, the District Court granted First Unum summary judgment dismissing Mr. Napoli's Complaint. In its Opinion and Order dated January 14, 2003 (Appdx. B), the District Court determined that no issues of fact existed such that summary judgment in favor of First Unum was warranted, and ruled that, among other things, Mr. Napoli was not entitled to a trial by jury or to any discovery.

Mr. Napoli filed a timely appeal from the Judgment to the United States Court of Appeals for the Second Circuit. On appeal, the Second Circuit, in an unpublished summary order, vacated and remanded the District Court's Order, primarily upon the grounds that issues of fact were presented on the summary judgment record warranting a denial of First Unum's motion for summary judgment. In addition, the Second Circuit, *inter alia*, affirmed the District Court's Decision to deny Mr. Napoli's application for a trial by jury.

As of the date of the filing of this Petition, Mr. Napoli is owed approximately $696,000 in past due long term disability benefits from First Unum, excluding interest.

Litigation is currently ongoing in the District Court in keeping with the Second Circuit remand.

REASONS FOR GRANTING THE PETITION

The Court needs to determine the right to a jury trial for the many thousands of plan beneficiaries seeking to enforce their rights to contractually defined benefits covered by ERISA-governed plans under § 502(a)(1)(B) of ERISA, where ten circuit courts have deprived plan beneficiaries of their right to jury trials, upon an equitable versus legal relief distinction, the underpinnings of which this Court overruled in *Great-West Life and Annuity Insurance Company v. Knudson*, 534 U.S. 204 (2002). Moreover, the First Circuit has not yet ruled on this issue and the District of Columbia Circuit has not yet ruled this issue, although a District Court determination ruling that jury trials are available under ERISA since 1991 continues to be followed in the District of Columbia Circuit. *McDonald v. Artcraft Electric Supply Co.*, 774 F. Supp. 29 (D.D.C. 1991). Thus, this Court's intervention is critical to protect the jury trial rights of thousands of plan beneficiaries, to clarify the issue among the circuits and correct the now flawed rationale for those circuits that deprive plan beneficiaries of a jury trial under § 502(a)(1)(B) of ERISA.

As this Court is aware, ERISA is silent as to whether plan beneficiaries seeking to enforce their rights in the Federal Courts are entitled to a trial by jury. Given the absence of statutory language or a clear direction from the legislative history to determine congressional intent regarding the jury trial issue, federal courts must analyze the nature of the underlying relief sought prior to the enactment of the statute to determine if the nature of the relief sought was such that, at common law, it is the type of relief that ordinarily would be tried to a jury. *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564-65 (1990).

In keeping with the foregoing analysis, the ten federal circuit courts to have addressed the issue all conclude that the relief sought by plan beneficiaries under ERISA is equitable, rather than legal, in nature, and, accordingly, conclude that plan beneficiaries are not entitled to trial by jury. *See, e.g., Sullivan v. LTV Aerospace and Defense Co.*, 82 F.3d 1251, 1257-59 (2d Cir. 1996); *DeFelice v. American Intern. Life Assur. Co. of New York*, 82 F.3d 1251, 1257-59 (2d Cir. 1996); *Pane v. RCA Corp.*, 868 F.2d 631, 636 (3d Cir. 1989); *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1006-07 (4th Cir. 1985); *Borst v. Chevron Corp.*, 36 F.3d 1308, 1323-24 (5th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995); *Bair v. General Motors Corp.*, 895 F.2d 1094, 1096-97 (6th Cir. 1990); *Mathews v. Sears Pension Plan*, 144 F.3d 461 (7th Cir. 1998), *cert. denied*, 525 U.S. 1054 (1998); *In re Vorpahl*, 695 F.2d 318, 320-22 (8th Cir. 1982); *Thomas v. Oregon Fruit Products Co.*, 228 F.3d 991, 996-97 (9th Cir. 2000); *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156, 1159-62 (10th Cir. 1998); *Hunt v. Hawthorne Associates, Inc.*, 119 F.3d 888 (11th Cir. 1997), *cert denied*, 523 U.S. 1120 (1998). As an additional factor, two circuit courts reason that jurors will fail to apprehend the arbitrary and capricious standard of review found in many ERISA benefit actions as an additional persuasive factor militating against jury trials in § 502(a)(1)(B) actions. *Sullivan v. LTV Aerospace and Defense Co.*, 82 F.3d 1251, 1257-59 (2d Cir. 1996); *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1006-07 (4th Cir. 1985).

I. The Equitable Versus Legal Distinction Employed By The Circuit Courts To Deny Plan Beneficiaries A Right To A Jury Trial Under ERISA Conflicts Directly With This Court's Decision In *Great-West*, Thus Warranting Intervention By This Court To Resolve This Important Constitutional Question

In ruling that no jury trial is available to ERISA plan beneficiaries seeking damages for past due benefits under group contracts, these ten circuits have all determined that actions for past due benefits by plan beneficiaries are, in essence, equitable claims seeking to compel trustees to pay past due monies. That rationale was completely rejected by this Court in *Great-West Life & Ann. Ins. Co. v. Knudson*, 534 U.S. 204 (2002). In *Great-West*, this Court reasoned that a claim for money due and owing under a contract, such as one for disability benefits, is an action at law. In relevant part, the Court stated:

> A claim for money due and owing under a contract is quintessentially an action at law. Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for "money damages," as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty. And money damages are, of course, the classic form of legal relief.

Id. at 210 (internal quotations and citations omitted).

In *Great-West*, this Court distinguished between the potential legal remedies afforded to a plan participant under Section 502(a)(1)(B) of ERISA (29 U.S.C. § 1132[a][1][B]) and the more limited equitable remedies afforded to plan fiduciaries by Section 502(a)(3) of ERISA. *Great-West*, 534 U.S. at 221. Significantly, this Court held that equitable remedies are not available to compel money past due under a contract as in the instant case. *Id.* at 210, 212-14, 221 (holding injunctive and other equitable restitutionary remedies unavailable for money due and owing under a contract).

The legal-equitable distinction contained in ERISA's civil enforcement provisions, as outlined in *Great-West*, is in accord with the principles of trust law which guide the federal courts in construing the rights of plan participants in ERISA-governed plans. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989). Significantly, the Restatement of Trusts provides, "[i]f the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment." Restatement of Trusts (Second) § 198 (1959). This applies to the instant case, where First UNUM, the trustee, is under a contractual duty to pay Mr. Napoli, the beneficiary, past due disability income benefits if Mr. Napoli's lawsuit is successful.

Critically, many of the circuits who have rejected the right to trial by jury under the statutory scheme also misplaced their reliance on this Court's decision in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), where, as here, the parties agree that the case involves a *de novo* review of Mr. Napoli's denied claim for benefits. Specifically, the circuit courts have relied upon *Firestone* to state that the trust-

like nature of ERISA renders claims made thereunder equitable, rather than legal, in nature. This analysis is not only belied by the restatement of trusts, as set forth above, but is also belied by the reasoning of *Firestone* itself. As this Court stated in *Firestone*:

> The trust law *de novo* standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA. Actions challenging an employer's denial of benefits before the enactment of ERISA were governed by principles of contract law. If the plan did not give the employer or administrator discretionary or final authority to construe uncertain terms, the Court reviewed the employee's claim as it would any other contract claim – by looking to the terms of the plan and other manifestations of the parties' intent.

Id. at 112-13.

Thus, any references to *Firestone*'s reliance upon language and terminology of trust law under ERISA to determine whether a jury trial is available in a *de novo* review case directly contradicts the reasoning of the decision itself. Mr. Napoli's claim undisputably seeks a *de novo* review by the federal courts of his denied disability benefits by First UNUM, who now owes Mr. Napoli almost $700,000. As explained by this Court in *Firestone*, Mr. Napoli has nothing more than a traditional claim for breach of contract seeking past disability benefits. This is plainly an action at law and the considerations of the ten circuit courts concerning the trust-like nature of ERISA, based upon their reliance on *Firestone*, is entirely misplaced.

Even where discretionary authority has been delegated to a fiduciary, making the arbitrary and capricious standard of review applicable to the judicial review of a claim for past due benefits, this Court's analysis in *Firestone* and *Great-West*, coupled with the legion of cases emphasizing the importance of the preservation of the constitutional right to a trial by jury, require a determination that those suits for past due benefits are also entitled to a trial by jury. Moreover, those courts that have determined a jury trial is inappropriate in a case involving an arbitrary and capricious standard of review base their determination on a rationale that underestimates the ability of the jurors to understand such a standard of review or receive an appropriate jury charge regarding same. *See, e.g., Sullivan v. LTV Aerospace and Defense Co.*, 82 F.3d 1251, 1258 (2d Cir. 1996) (reasoning that arbitrary and capricious standard of review of the administrators' claim determination "[i]s not readily communicated to jurors"). Jurors are compelled to reach verdicts on a daily basis based on varying standards of evidence and complex jury charges in all types of matters including fraud, civil RICO, criminal and other civil matters. Applying an arbitrary and capricious standard will not depart significantly from that asked of any jurors on a daily basis. In any event, such a rationale does not provide a sufficient basis to disregard such a jealously-guarded constitutional protection.

Based on the sound reasoning of *Great-West* and the principles of trust law, Mr. Napoli's claims for past due benefits are legal in nature. While Mr. Napoli's First Amended Complaint also seeks declaratory relief in the form of payment of future benefits, this Court has held that where legal (backpay) and equitable remedies (breach of fiduciary duty) are equipoised in the same action, a plaintiff's Seventh

Amendment right to a jury trial shall not be derogated. *See Chauffeurs Teamsters and Helpers v. Terry*, 494 U.S. 558, 573 (1990).

As this Court instructed in *Chauffeurs*:

> Since the merger of the systems of law and equity, this Court has carefully preserved the right to trial by jury where legal rights are at stake. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Chauffeurs and Teamsters, 494 U.S. at 564-65, *supra* (internal quotations and citations omitted).

Unfortunately, while ERISA was intended to broaden, not curtail, the protections and rights afforded to plan beneficiaries prior to its enactment, *see Firestone*, 489 U.S. at 113-14, *supra*, the Second Circuit's previous holdings and the holdings of other circuits have unconstitutionally curtailed beneficiaries like Mr. Napoli's right to a jury trial. These beneficiaries would have enjoyed this right but for the ironic circumstance of their disability plans falling under a statute designed to afford them greater procedural protections.

II. The Urgent Need For This Court To Answer The Question Regarding The Right To A Jury Trial In The First And District Of Columbia Circuits, Coupled With The Confusion That Has Started To Occur In The Wake Of The *Great-West* Decision Presents Additional Compelling Reasons For The Granting Of The Writ

This Court should grant this writ not only to clarify plan beneficiaries' rights to trial by jury in actions seeking past monies due under § 502(a)(1)(B) of ERISA, but to clarify those rights in the First Circuit and the District of Columbia Circuit. Moreover, District Courts all over the country need clear precedent from this Court as they are repeatedly being asked to re-visit the jury trial issue in light of *Great-West*.

The First Circuit has, for example, continued to expressly decline to rule whether jury trials are available in *de novo* review cases under ERISA. *Liston v. Unum Corporation Officer Severance Plan*, 330 F.3d 19, 24 n.4 (3d Cir. 2003). The First Circuit has, however, noted the existence of varying opinions in the federal courts concerning the right of an insured to have a jury make factual findings. *Recupero v. The New England Telephone and Telegraph Co.*, 118 F.3d 820, 831 (1st Cir. 1997).

The District of Columbia Circuit has also not ruled on the question whether jury trials are available in *de novo* cases involving claims for past due benefits under ERISA. Nevertheless, the District of Columbia District Court ruled in 1991 that jury trials were available under those circumstances. *McDonald v. Artcraft Electric Supply Company*, 774 F. Supp. 29, 33-36 (D.D.C. 1991). The District Court in *McDonald* distinguished cases from other circuits

and correctly employed the analysis contained in this Court's decision in *Firestone* from a breach of contract, rather than trust law, standpoint.

Moreover, a New York District Court recently ruled that current and former employees participating in an employee benefit fund had the right to a jury trial, in their action against the trustees of that firm, for damages resulting from the trustees' mismanagement of that fund. *Bona v. Barasch*, 2003 WL 1395932 (S.D.N.Y. 2003). In *Bona*, the Court stated that while *Great-West* did not "[d]eal with the right to a trial by jury *per se*, the Supreme Court's explication of the distinction between law and equity," was relevant to its analysis whether the plaintiffs were entitled to a jury trial on their ERISA claims. 2003 WL 1395932, at *34. While the Court in *Bona* analyzed the legal and equitable distinction in an action arising under § 501(a)(2), not § 502(a)(1)(B), as in this case, this distinction does not change the analysis or the result in light of this Court's decision in *Great-West*.

Accordingly, this Court should grant this Writ of Certiorari to clarify and unify the variances between the circuits and the need for consistency amongst the circuits in light of this Court's decision in *Great-West*.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED OCTOBER 29, 2003

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 29th day of October, two thousand and three.

PRESENT:

RALPH K. WINTER
JOSÉ A. CABRANES
*Circuit Judges.**

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* Judge Sack, originally a member of the panel, recused himself prior to oral argument and did not participate in this decision. The appeal is being disposed of by the remaining members of the panel, who are in agreement. *See* 2d Cir. R. 0.14; *Murray v. Nat'l Broad. Co., Inc.*, 35 F.3d 45 (2d Cir. 1994).

Appendix A

No. 03-7092

LOUIS R. NAPOLI,

Plaintiff-Appellant,

v.

FIRST UNUM LIFE INSURANCE COMPANY,

Defendant-Appellee.

Appeal from a judgment by the United States District Court for the Southern District of New York (John S. Martin, *Judge*).

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court be and it hereby is **VACATED** and **REMANDED** for further proceedings consistent with this order.

After suffering a heart attack in November 1996 at age 55, plaintiff Louis R. Napoli received monthly disability benefits from First Unum Life Insurance Company, under a long-term disability policy issued to his employer, on the basis that "because of injury or sickness [Napoli] cannot perform each of the material duties of his regular occupation [as a government securities bond broker]," *i.e.*, that Napoli was "disabled" as defined by the First Unum policy and consequently qualified for benefits. Seven months later, however, First Unum determined that Napoli was not

"disabled" and terminated his benefits. Napoli appealed the termination of benefits to First Unum's Quality Review Section, which rendered a ruling adverse to Napoli.

In terminating Napoli's benefits, First Unum relied, in part, on the opinion of Dr. Richard W. Nesto, who reviewed Napoli's medical records upon First Unum's request. Dr. Nesto concluded that Napoli "could physically perform sedentary to light occupation," that "it appears reasonable . . . for [Napoli] to return to work as a stockbroker on this basis," and that "[a]lthough the relative risk of a 'triggered' cardiac event is higher when exposed to stress, the *absolute* risk of an acute cardiac event in a daily basis is so small it is not quantifiable." Dr. Nesto also concluded that Napoli "should be able to return even to a perceived stressful occupation without restriction on a cardiac basis."

The administrative record also included a contrary opinion by Dr. Aaron Freilich, Napoli's treating cardiologist. While Dr. Freilich "did not necessarily disagree" with Dr. Nesto's assessment, he stated that Napoli "could return to a less stressful occupation but it is [Dr. Freilich's] opinion that he should not return to his prior stress occupation."

After receiving the adverse administrative ruling, Napoli commenced this action under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, against First Unum on February 23, 1999, and on October 31, 2000, he filed an amended complaint for reasons not germane to this appeal. Napoli sought declaratory judgment that he is disabled within the meaning of the policy, reinstatement of his benefits, payment of all benefits in arrears, and costs and fees applicable under ERISA.

Appendix A

On January 15, 2002, First Unum filed a "Motion for Judgment on the Administrative Record," to which First Unum attached a copy of the administrative record. In opposition to First Unum's motion, Napoli cross-moved for discovery, a jury trial, and supplementation of the record, and, to that end, he proffered several exhibits for admission.

By opinion and order dated January 16, 2003, the District Court, treating First Unum's motion as one for summary judgment, granted summary judgment in favor of First Unum and, other than supplementing the record with an affidavit of Dr. Freilich, denied Napoli's motion. In its review of the evidence, the Court described Napoli's claim as "a close case" but determined that Napoli's heart condition "did not render him permanently disabled to act as a bond broker." The Court thus concluded that First Unum "properly determined that [Napoli] was not permanently disabled."

This timely appeal followed. On appeal, Napoli challenges the District Court's resolution of his claim by summary judgment, contending that there were genuine issues of Material fact as to whether Napoli was disabled under the terms of the First Unum policy and that the District Court made impermissible credibility determinations at the summary judgment stage. Napoli also contends that the District Court: (1) abused its discretion in failing to admit certain evidence proffered by Napoli; and (2) improperly denied Napoli's motion for a trial by jury.

We review the legal conclusions of the District Court *de novo* and, in turn, review the underlying administrative decision *de novo*. *See Firestone Tire & Rubber Co. v. Bruch,*

489 U.S. 101, 114 (1989); *Masella v. Blue Cross & Blue Shield,* 936 F.2d 98, 102 (2d Cir. 1991). But our review of the administrative decision, like that of the District Court, is "limited to the record in front of the claim administrator unless the . . . court finds good cause to consider additional evidence." *DeFelice v. American Int'l Life Assur. Co.,* 112 F.3d 61, 67 (2d Cir. 1997); *id.* (describing the court's role in reviewing an ERISA claim determination as a "limited *de novo* review").

Turning to Napoli's challenge to the District Court's grant of summary judgment in favor of First Unum, we note that, although First Unum styled its motion as one for "Judgment on the Administrative Record," we are bound by the District Court's treatment of that motion as one for summary judgment. Accordingly, we recall the familiar standard governing summary judgment motions: Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The issue presented by Napoli's suit is the propriety of First Unum's conclusion that Napoli is not "disabled" as defined by the policy. In addressing that issue, the District Court considered the opinions of two doctors—Dr. Freilich and Dr. Nesto—that were documented in the administrative record. Their reports reveal different opinions concerning Napoli's ability to "perform the material duties of his regular occupation." Significantly, Dr. Nesto concluded that Napoli

could return to work as a government securities bond broker without endangering his health, and Dr. Freilich concluded that Napoli could not.

In granting summary judgment, the District Court essentially adopted the opinion of Dr. Nesto over that of Dr. Freilich. Although the Court stated that "[t]here is no substantial difference of opinion between Dr. Freilich and Dr. Nesto," the Court could only reach that conclusion by discrediting Dr. Freilich's opinion that Napoli "should not return to his prior stress occupation." Such a credibility determination is appropriate at a trial, but it exceeds the scope of a judge's authority in considering a summary judgment motion. Absent any indication that Dr. Freilich's opinion is unreliable as a matter of law, the differing opinions of the two doctors present a genuine issue as to the material fact of Napoli's medical condition. Accordingly, because genuine issues of material fact exist in this case and its resolution depends in part, on credibility determinations, the District Court improperly granted summary judgment to First Unum. We thus vacate the District Court's judgment and remand the cause for a trial, in which the trier of fact is free to decide issues of material fact and make credibility determinations under a "limited *de novo* review" of the administrative decision.

While declining to comment on the future resolution of this case, we note that the trier of fact may decline to consider any evidence that has not already been considered and may ultimately reach the same result as the result of the judgment currently on appeal. Notwithstanding this possibility, remand is necessary because, as noted above, summary judgment is an inappropriate resolution of this case.

As to Napoli's two other grounds for appeal, we find neither to be of merit. "[T]he decision whether to admit additional evidence is one which is discretionary with the district court, but which discretion ought not be exercised in the absence of good cause." *DeFelice,* 112 F.3d at 66. Having reviewed the evidence at issue and considered the parties' arguments, we hold that the District Court did not abuse its discretion in limiting its review to the administrative record and Dr. Freilich's affidavit. And Napoli's suit is not entitled to a jury trial. *See Sullivan v. LTV Aerospace & Defense Co.,* 82 F.3d 1251, 1258-59 (2d Cir. 1996); *DeFelice,* 112 F.3d at 64-65. On remand, the District Court is obligated, as it has already acknowledged, to conduct a nonjury *de novo* review of First Unum's determination.

* * *

We hereby VACATE the judgment of the District Court and REMAND the cause for further proceedings consistent with this order.

FOR THE COURT
Roseann B. MacKechnie, Clerk of Court

by: s/ Lucille Carr

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JANUARY 13, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 1329 (JSM)

NAPOLI,

Plaintiff

-v.-

FIRST UNUM LIFE INS. CO.,

Defendants.

JUDGE JOHN S. MARTIN, Jr., District Judge:

Plaintiff Louis R. Napoli, a bond trader, has not worked since November 29, 1996, when he suffered a heart attack at work and had emergency by-pass surgery. After a period in which he received payments from the Defendant under a disability insurance contract, Defendant notified Plaintiff that they were terminating his benefits because it had determined that he was not permanently disabled. Plaintiff then commenced this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq.*, seeking to compel Defendant to continue paying him under his disability contract. Defendant now moves for summary judgment on the ground that the administrative

record supports its determination that Plaintiff is not permanently disabled. Plaintiff has cross-moved to supplement the record and for a jury trial. Plaintiff's motion for a jury trial is denied, but its motion to supplement the record is granted in part. Having reviewed the record as supplemented, the Defendant's motion for summary judgment is granted.

In an action such as this, to review the denial of benefits under ERISA, the Court is to conduct a nonjury de novo review of the plan administrator's determination. *DeFelice v. American Int'l Life Assurance Co. of New York,* 112 F.3d 61, 64 (2d Cir. 1997). Plaintiff is not entitled to a jury trial. *Id.*, at 64; *Tischmann v. ITT/Sheraton Corp.,* 145 F.3d 561, 568 (2d Cir.), cert. denied, 119 S. Ct. 406 (1998); *Sullivan v. LTV Aerospace & Defense Co.,* 82 F.3d 1251, 1258 (2d Cir. 1996).

Where the administrator is also the party who will pay the benefits, the court has the discretion to admit additional evidence that was not part of the record before the administrator. *DeFelice, supra,* 112 F.3d at 65. In this case, Plaintiff seeks to conduct discovery and to have a trial at which he can offer additional evidence.

Having examined the record, the Court, in the exercise of its discretion, denies the application for discovery and for a trial for the taking of additional testimony. However, the Court will consider the affidavit of Dr. Frelich for the additional information it contains concerning Plaintiff's condition.

Appendix B

DISCUSSION

The insurance policy at issue here provides:

> Disability and disabled mean that because of injury or sickness you cannot perform each of the material duties of your regular occupation.

There is no question that Plaintiff has the physical ability to perform each of the material duties of his regular occupation. The issue is what degree of risk of future damage to one's health will render one totally disabled to perform his or her regular occupation. Plaintiff contends that he is disabled because there is some risk that, if he returns to work, the stress of his work may cause another serious heart attack. While not denying that Plaintiff may face some risk of future heart problems, if he returns to work, Defendant contends that the risk is so insubstantial that it does not preclude Plaintiff from returning to work.

In the Affidavit submitted by Plaintiff, Dr. Frelich states: "Mr. Napoli's Coronary Artery Disease is not curable, is a permanent condition and the avoidance of excessive stress from his occupation as a government bond broker could prevent a further heart attack." The affidavit also states: "the extreme stress of Mr. Napoli's occupation could progress his Coronary Artery Disease and could again exacerbate his heart condition, causing another heart attack."

For its part, Defendant notes that after Dr. Frelich was contacted by a physician employed by the Defendant in

August, 1997, while the claim was under review, he signed as accurate a memo memorializing his conversation, which stated:

> You believe that Mr. Napoli should not engage in any activity that produces stress—be it work or arguing with his wife. For that reason, you and he decided that he should not return to work. Medically, he could tolerate this, and if he wanted to return to work, you would not suggest otherwise.

Defendant also relies on an opinion it obtained from Dr. Richard Nesto, a cardiologist who was an Associate Professor of Medicine at Harvard Medical School. Dr. Nesto's report noted, among other things, that Mr. Napoli had performed well on his stress test and concluded that "he is in an excellent prognostic category and in usual circumstances would be able to return to fully employment. . . ." Dr. Nesto was of the opinion that it was unlikely that stress on the job contributed to the development of Plaintiff's atherosclerosis. Dr. Nesto stated that in his opinion:

> Although the relative risk of a "triggered" cardiac event is higher when exposed to stress, the *absolute* risk of an acute cardiac event in [sic] a daily basis is so small it is not quantifiable.

The question before the court comes down to whether a party should be considered totally disabled if there is even the slightest risk that the stress of his work might cause

another heart attack. The principles to be applied in answering this question were set forth in *Lasser v. Reliance Standard Life Ins. Co.*, 146 F. Supp. 2d 619, 628 (D.N.J. 2001):

> It is a basic tenet of insurance law that an insured is disabled when the activity in question would aggravate a serious condition affecting the insured's health. *See Stark v. Weinberger,* 497 F.2d 1092, 1098-99 (7th Cir. 1974); *Oppenheim v. Finch,* 495 F.2d 396, 398 (4th Cir. 1974); *Stillwell v. Sullivan,* 1992 WL 401971, *6 (D.Kan. Dec. 30, 1992). As noted in the Applemans' treatise, "The insured is considered to be . . . disabled where it is impossible for him to work without hazarding his health or risking his life." 1C Appleman, *Insurance Law & Practice* § 651 at 241 (1981). In fact, this proposition is sufficiently well-settled that in many jurisdictions it travels under the name of the "common care and prudence rule." E.L. Kellett, Annotation, *Continuation of Work as Affecting Finding of Total or Permanent Disability within Insurance Coverage,* 24 A.L.R.3d 8, § 3(a) (1969); *see, e.g., McGowan v. Orleans Furniture Inc.,* 586 So.2d 163, 166 (Miss. 1991); *John Hancock Mut. Life Ins. Co. v. Poss,* 154 Ga. App. 272, 267 S.W.2d 877, 880 (1980).
>
> Insureds with heart conditions or who have experienced heart attacks provide an obvious context for the application of these principles. E.L. Kellett, Annotation, *Heart or Vascular Condition*

> *as Constituting Total or Permanent Disability within Insurance Coverage*, 21 A.L.R. 3d 1383, § 3 (1968). Where medical prudence requires a cessation of work activity, the insured is disabled. . . .

However, the courts attempting to determine whether someone who has had a serious heart attack and by-pass surgery is totally disabled have reached different results. *Compare Pompe v. Cont'l Casualty Co.*, 119 F. Supp. 2d 1004 (W.D. Mo. 2000); *Buffaloe v. Reliance Standard Life Ins. Co.*, No. 99 Civ. 710, 2000 WL 33951195 (E.D.N.C. 2000) *with Rosenthal v. First Unum Life Ins. Co.*, No. 00 Civ. 3204, 2002 WL 975627 (S.D.N.Y. 2002); *Mihok v. Magnetek, Inc.*, No. 10 CV 2446, 2002 WL 1162843 (C.D. Cal. 2002). These apparently inconsistent results may be attributable to the different factual situations rather than a disagreement as to the governing legal principles.

Obviously, every case must be judged on its particular facts. While this is a close case, it is reasonable to conclude that the Plaintiff's heart condition did not render him permanently disabled to act as a bond broker.

There is no substantial difference of opinion between Dr. Frelich and Dr. Nesto. Both of them agree that returning to work would pose some risk for Plaintiff. While Dr. Nesto says the risk is "so small it is not quantifiable," Dr. Frelich does not quantify the risk but says only that Plaintiff's return to work "could" trigger a heart attack.

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It does not appear that most people today who have suffered heart problems similar to Plaintiff would consider themselves disabled. The Court can take judicial notice of the fact that although the Vice-President of the United States has had serious heart problems, he has not considered the risk of his high stress job as rendering him disabled. Similarly, all of us know people active in high stress professions, including judges, who have had coronary by-pass surgery similar to Plaintiff's.

Since many with conditions as serious as Plaintiff's continue in high stress occupations, how is the Court to draw the line between those who are permanently disabled and those who are not? Perhaps a practical way to answer the question is to ask: Is it likely that the person would have returned to work, even if he did not have disability insurance or other substantial assets? Here, the evidence in the record supports the conclusion that Plaintiff would have returned to his normal occupation if he needed that income to support himself and his family. As noted above, Dr. Frelich told one of the Defendant's doctors that he would not have opposed Plaintiff returning to work if that is what he wanted to do. In addition, Dr. Nesto's opinion that there was such a slight risk of future problems that it was unquantifiable, supports the conclusion that one who depended on the income from his work would not be deterred from going back to work by the risk that Plaintiff faced. Thus, on this record the Court concludes that the Defendant properly determined that Plaintiff was not permanently disabled.

For the foregoing reasons, the Defendant's Motion for Summary Judgment is granted and the Complaint is dismissed.

Appendix B

SO ORDERED.

Dated: New York, New York
January 13, 2003

s/ John S. Martin
JOHN S. MARTIN, JR., U.S.D.J.